No. 22,515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 899, AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION NO. 556, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 381; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOINT COUNCIL OF TEAMSTERS NO 42, AND SAN LUIS OBISPO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Respondents.

Brief for Respondent Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 556, AFL-CIO.

CHARLES M. ARAK,
629 South Hill Street,
Los Angeles, Calif. 90014,
Attorney for Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 556, AFL-CIO.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 22,515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 899, AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION NO. 566, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 381; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOINT COUNCIL OF TEAMSTERS NO. 42, AND SAN LUIS OBISPO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Respondents.

Brief for Respondent Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 556, AFL-CIO.

JURISDICTION.

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),

for enforcement of its order [R. 71; 33][1] issued against the respondents on July 23, 1967, and reported at 166 NLRB No. 92. This court has jurisdiction of the proceeding under Section 10(e), the alleged unfair labor practices having occurred at Arroyo Grande and San Louis Obispo, California.

STATEMENT OF THE CASE.

I.

The Board's Findings of Fact.

Briefly, the Board found that the respondent Unions violated Section 8(b)(7)(C) of the Act by picketing the Company stores for more than thirty days without the filing of an election petition and with a proscribed recognitional objective. The evidence upon which the Board based its findings is as follows:

A. The Picketing of the Company Stores.

State Mart, Inc., hereinafter referred to as the Company, is engaged in the operation of two retail food stores in Southern California, one in Arroyo Grande and the other in San Luis Obispo [R. 34; Tr. 67]. At no time pertinent to the issues involved herein were the employees at either store represented by a labor organization [R. 35]. No election has ever been held to determine the employees' choice in regard to unionism; nor

---

[1]References designated "R" are to Volume I of the record as reproduced pursuant to rule 10 of this Court. "Tr." references are to the reporter's transcript of testimony as reproduced in volume II of the record.

has any labor organization sought to obtain such an election (*Ibid.*).

Respondent, Retail Clerks International Association, Local Union No. 899, hereinafter called Retail Clerks, and respondent, Amalgamated Meat Cutters and Butcher Workmen, Local Union No. 856, hereinafter called Meat Cutters, established picket lines at both stores with signs reading as follows [R. 35; Tr. 74]:

> "This market unfair because they do not pay the prevailing wage rates or benefits paid by other markets in the area. Members of Retail Clerks Local 899 and Meatcutters Local 556, AFL-CIO, protest the substandard wage rates paid in this market." [R. 35; Tr. 96, 127-128].

B. The February 1 Meeting.

On January 27, 1966, Company attorney Ted R. Frame telephoned Kenneth Schwartz, counsel for the Retail Clerks, in order to find out what could be done to bring about the removal of the picket line [R. 36; Tr. 13-14, 149]. In response to this inquiry, Schwartz stated that the picket lines would be lifted if the Company would adhere to the wages and working conditions prevailing in the area. The Union and Company representatives agreed to meet at a future date for the purpose of defining the precise nature of "area standards."

The meeting took place on February 1, 1966 [R. 37; Tr. 15, 151]. At the outset, Schwartz, acting as spokesman for the Retail Clerks and Meat Cutters, stated that the meeting was being held solely to advise

the Company "what we meant by standards in this particular area" and that the Unions did not intend either to "ask for an organization" or to "negotiate an agreement" [R. 37; Tr. 152]. Schwartz proceeded to set forth the Unions' definition of area standards, stating that such standards encompass not only wages but also "fringe benefits" and "other benefits", including health and welfare plans, pensions and vacations [R. 37; Tr. 153]. Schwartz emphasized that the Company "was to maintain the standards in the area, whatever the standards would be, and for whatever time the standards were in effect" [Tr. 177]. At this point, the Union representatives produced copies of the area bargaining agreements [R. 37; Tr. 20, 156-158] after striking therefrom certain clauses which would obviously not bear upon the question of area standards [R. 37-38; Tr. 158-160].

Schwartz, further stated that in presenting the contracts *he did not "want it to be construed that* [*he was*] *making any demands* but [he wanted the Company] to know the *type of benefits* the employees enjoy under our agreement, *to explain the area standards"* [R. 37; Tr. 158; emphasis supplied.] When the Company representatives inquired as to the possibility of *modifying* certain of the area standards, the Unions stated that the meeting was not a negotiating session, that none of the benefits were subject to negotiation, and that the contracts spoke for themselves in regard to the definition of the benefits [R. 39; Tr. 18, 173].

At the conclusion of the meeting, the Company representatives stated that they would be unable to make an immediate decision in regard to the matter and the picketing continued. *At no time did any Company representative disagree with the Union definition of area standards.*

II.

The Board Conclusion and Order.

Upon the foregoing facts, the Board found that the respondent Unions had violated Section 8(b)(7)(C) of the Act by picketing the Company stores for more than thirty days without the filing of an election petition and with a proscribed recognitional objective. The Board issued an order requiring all respondent Unions to cease and desist from the unfair labor practices found and to post the appropriate notices [R. 71; 33].

ISSUE.

The issue before the Court is—Did the Board properly find that the Respondent Unions had a recognitional objective when they picketed the Company's stores.

ARGUMENT.

The Board finding that picketing by the Respondent Unions was in violation of Section 8(b)(7)(C) of the Act, is improper, in that it is not supported by substantial evidence.

A. Introduction.

Section 8(b)(7), part of the 1959 Amendments to the Act, governs recognitional and organizational picketing. Sub-Section (C) of 8(b)(7) prohibits picketing by an uncertified Union where an object of the picketing is "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees," if such picketing has been conducted for more than 30 days without the filing of a petition for election.

B. Respondent Unions Only Interest Was in the Preservation of Area Standards.

The law is clear that a Union may picket an employer for the purpose of compelling compliance with prevailing area wage and benefit standards. The Board regards such picketing activity, "area standards picketing", as non-recognitional and not prohibited by Section 8(b)(7)(C).

Local Union 741, Plumbers Union (Keith Riggs Plumbing and Heating Contractor), 137 NLRB 1125;

McLeod v. Chefs, Cooks, Pastry Cooks Local 89 (Stork Restaurant), 280 F. 2d 760.

The Board in its opening brief at page 9 agrees that "In the instant case Respondent Unions have consistently described their picketing as motivated sole-

> ly by such a permissible area standards object. Undeniably, the formal declarations of Union representatives and the legends of the picket signs were entirely consistent with this purported objective. Moreover no direct demands for representative status were ever made and, in fact, on several occasions, the Unions expressly disclaimed all recognitional ambitions."

In the face of the foregoing, the Board then contends at page 9 of its opening brief:

> "The Board is not bound by a Union's self serving description of its own objective."

There is, however, no evidence of any kind or nature that would indicate;

(1) That the Unions had any objective other than the preservation of area standards, or

(2) That this was in fact a self serving description of the Unions' objective.

Every act on the part of the Unions was consistent, with their avowed objective, that of preserving area standards.

The Board appears to be saying in its opening brief that there was some conduct, "actual conduct", on the part of the Unions that reflects an underlying recognitional object. Again, this is not borne out by the evidence.

The Unions did not at any time claim that they represented the employees. The Unions did not at any time ask for a contract with State-Mart. The Unions were explicit in their statements that they were not at the meeting of February 1, 1966, to negotiate a contract.

The sole objective of the Unions was to create a situation where the employer would be paying to his employees wages and benefits equivalent to those prevailing in the area. In short, the Unions were interested in preserving the area standards.

In furtherance of this legitimate objective, when asked what are the area standards, the Unions replied that the area standards were in essence contained in their contracts with other employers in the area. This is a truthful statement, it represents the facts as they were on February 1, 1966, and as they now exist.

The evidence at the hearing was to the effect that the area is largely organized by the Unions, and that those Union contracts therefore are in fact representative of area standards for the food market employees within that area.

Further, area standards embraces more than mere costs to the employer. A labor organization has a legitimate interest apart from recognition or bargaining to require that employers meet prevailing wage scales in an area, and that employers meet prevailing employee benefits.

Keith Riggs, supra.

Reference is made in the Board's and Intervenors opening briefs, to the fact that the Union contracts as submitted to the employer contained certain provisions, namely a grievance and arbitration provision, and pension provisions, the inclusion of which point up the fact that the demand of the Unions was in fact recognitional.

The presentation of the contracts and the contents of those contracts must be considered within the frame-

work, and in the context in which they were presented to the employer. It was made clear to the employer that the contracts were given to Mr. Frame as an example of the area standards. The contracts were not given Frame for the purpose of negotiating a contract between the employer and the Unions. Obviously under these conditions neither side, the employer, or the Unions, could reasonably have believed that a Union-Employer grievance and arbitration provisions was contemplated as part of the area standards. Representation was expressly disclaimed by the Unions at all times.

Further, there is nothing improper in assuming that a pension arrangement for employees, a cost item, is part of area standards where such pension is in fact in effect within that area. It is submitted that the Unions were within their rights in asking that the pension be included as part of the area standards.

The contention of Intervenor, that the pension provisions required a contract with the Unions, is entirely without any basis in fact. The employer was free to provide such benefits in whatever manner he was able so to do. It is not unreasonable to require that the employer provide a pension plan equal to that in effect within the area. It is not unreasonable to require that the employer meet all of the area standards, including the pension, and not merely wages.

Neither the Courts nor the Board have used cost alone as a sole determining factor in area standards cases. If the employer is sufficiently convinced that he does not wish to be an organized employer, he must logically take the position that he does not wish to be an organized employer at any cost. Therefore to ask him to comply with area standards by providing equal wages

and equal benefits, including pension, is not asking for more than the employer should expect to provide.

Nor is there anything improper contained in the provisions of the Meat Cutters Pension Plan, and more particularly page 17 Paragraph J thereof, as is set forth in General Counsel's Exhibit 4. Paragraph J is attached hereto as Appendix A.

That paragraph is in fact nothing more than a provision for early vesting of a pension. It provides:

1. That a meat cutter employed for 24 months shall have his pension rights vest, provided
2. That upon transfer of employment he transfers to employment similar to that at which he had worked for the 24 month period.

This pension provision is not dependent upon Union membership or participation in any way whatsoever. There is no reason why the employer could not offer its employees the same pension benefit.

What the Board is in effect saying is that the sum total of the demands made upon the employer was more than he could reasonably meet and still stay in business; "The most practical alternative is the adoption of the Union contract".

The Board in adopting the Trial Examiner's reasoning is reaching a conclusion that is not substantiated by or warranted by the evidence. The employer is not faced with the alternative of adopting the Union contract. The employer was not offered that alternative, there is no evidence that any Union representative ever offered to enter into a contract with the employer. Further, the employer may or may not have been considering the actual cost.

The Trial Examiner's decision adopted by the Board states at page 13 of that decision:

> "The record is barred of evidence as to the cost of equivalent health and welfare or pension benefits if State-Mart be required to supply them from a source other than the contract plans and trusts."

With the record barren of such evidence, the Trial Examiner then concludes that the cost to an individual employer as contrasted to the contract employer under group plans or trusts "would present a virtual economic impossibility."

The Trial Examiner then proceeds further to conclude, without a shred of evidence to support the conclusion:

> "The most obvious way that State-Mart could provide equivalent benefits at a feasible cost would be for it to become party signatory to the contracts and thus to become eligible to avail itself of the trust funds."

The Trial Examiner further concludes, and likewise without any evidence in support of his position:

> "These contracts were before it, and appeared as a practical alternative to an economically impossible demand."

From the above reasoning based upon no evidentiary finding, the Trial Examiner concludes:

> "Presenting an employer with a demand that it cannot reasonably meet and still stay in business and placing this in a context where the most practical alternative is the adoption of a union contract, gives rise to an inference that the unions' express disclaimers of a recognitional or bargaining object may be a mere pretext . . ."

There is no showing whatsoever that there was any demand made that the employer could not reasonably meet and still stay in business, nor is there any showing that the most practical alternative is the adoption of a union contract.

It may very well be that from the employer's standpoint the adoption of a union contract, even though it may cost less money, is a very impractical alternative.

From the foregoing it appears that what the Trial Examiner has said, and what the Board has upheld, is a ruling that suggests that a Union can request an employer to comply with area standards and thereby raise the employers wage rates and improve the employee benefits to the levels within the area, only if the employer agrees that it is economical and convenient so to do; and that if the employer finds it uneconomical and impractical then the Union will be found to have demanded recognition.

The above conclusions are entirely without basis in fact or evidence, or in the law.

The Board and the Courts have, on numerous occasions, stated:

> "Conclusions based on surmise or conjecture cannot stand."
>
> *NLRB v. Covington Motor Co.,* 344 F. 2d 136 (C.A. 4, 1965);
>
> *NLRB v. Deerfield Screw Prod. Co.,* 329 F. 2d 558 (C.A. 6, 1964).

The Board in its opening brief at page 11 anticipates the Unions' reliance on *Local 741 Plumbers Union (Keith Riggs Plumbing)*, 137 NLRB 1125:

We do cite that case; not out of context as suggested by the Board, but fully and entirely; the portion of *Keith Riggs* that is pertinent to the instant case appears at page 1127 of the majority opinion:

> "Our dissenting colleagues point to no evidence which would indicate *that respondent* [*union*] *was* insincere in its statements that it was not seeking *to negotiate with Riggs.* They merely assert, as they have elsewhere, . . . that picketing to compel a change in wages and working conditions 'necessarily' is for the purpose of recognition and bargaining. *This is stated as virtually a proposition of law. There is no judicial or legislative support for any such proposition. If Congress had intended to ban all picketing after thirty days, which is substantially what the dissenting view would accomplish, it could have achieved that objective in straight-forward and simple language.* We hold, therefore, as did the Trial Examiner, that the picketing on the evidence in this case did not have for an object recognition or bargaining." (Emphasis supplied).

In the instant case as in *Keith Riggs,* the Unions have a legitimate interest other than recognitional; to see that all employers, organized or not, meet area wage scales and area employee benefits, for the reason that employers committed to less, undermine area standards.

There is no evidence whatever in the instant case to substantiate a finding that the Unions were in any manner or at all insincere in their statements that they were not seeking to negotiate a contract with the employer. There is nothing in the evidence to substantiate the contemplation of a Union—Union member-employer relationship.

Area standards are not measured by whether the employer can afford to meet those area standards, but are in fact measured by the level of *wages and benefits,* and not by cost. (*Keith Riggs, supra*). In furtherance of such objective, the Unions have a right to peacefully picket.

The Board in adopting the decision of the Trial Examiner is acting in exactly the manner proscribed by the Court in *Keith Riggs*. The Board is stating "virtually as a proposition of law" that

> "Where a Union is not content with equalizing labor cost but requires adoption of details identical with Union contract, a recognitional objective is established, *and no further showing need be made.*" (Emphasis added).

The Board is in fact saying no matter what your avowed purpose, no matter how carefully or fairly you comply with the rules laid down in previous Board and Court decisions, no matter what you say, or how you act, we find *as a matter of law,* that you have demanded recognition.

It is submitted that a finding and decision such as this is improper under the law and is improper under the evidence in the instant case.

Reasonably and logically the cases that define "area standards picketing" vs. "recognitional picketing" agree that wages and benefits are of concern in area standards; that where a Union—Union member-employer relationship is contemplated the picketing is recognitional. (The term recognitional obviously assumes that the Union have members employed by employer and that it be recognized as a bargaining agent.)

The rules and boundaries have been laid down as set forth herein; the Unions complied with the rules and remained within the designated boundaries of "area standards picketing". To hold otherwise is to completely obliterate area standards picketing and to take away from Unions their right to establish equality of wages and benefits in a given area.

Here, there is no evidence whatever to indicate recognitional picketing on the part of the Unions. Cases cited by the Board such as *Centralia Bldg. and Const. Trades Council v. N.L.R.B.*, 363 F. 2d 699, and *N.L.R.B. v. Carpenters Local 2133*, 356 F. 2d 464, do not apply.

Conclusion.

For the reasons herein stated it is respectfully submitted that enforcement of the Board's order should be denied.

CHARLES M. ARAK,
Attorney for Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 556, AFL-CIO.

Dated: June 11, 1968.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES M. ARAK

APPENDIX A.

J. Preservation of Pension Credits.

An employee in the industry employed by an Employer pursuant to a collective bargaining agreement with Meat Cutters Locals No. 421, 551, 439, 556 and 587 and who has acquired service credits under the Southern California Meat Cutters Unions and Food Employers Pension Trust Fund shall be entitled to preservation of such service credits under the following conditions:

1. That he has earned service credits of at least twenty-four (24) months under the Southern California Meat Cutters Unions and Food Employers Pension Trust Fund.

2. Provided such employee meets the requirement in (1) above, such employee on transferring to employment similar to that for which service credit would be earned under the Southern California Meat Cutters Unions and Food Employers Pension Trust Fund in the industry, to any other employer in the state of California, shall have his pension credits preserved, provided further that evidence satisfactory to the Trustees of this Trust is submitted showing that the employee remained in employment similar to employment covered by the Southern California Meat Cutters Unions and Food Employers Pension Trust Fund in the state of California, for a time sufficient to complete ten (10) years of future credited service under the Southern California Meat Cutters Unions and Food Employers Pen-

sion Trust Fund and such other similar trust fund. Then his credited past service and his future credited service of less than ten (10) years under the Southern California Meat Cutters Unions and Food Employers Pension Trust Fund shall become vested and shall be preserved by this Trust.

3. The rules and regulations, break in service rules, other pertinent provisions, amendments and regulations in connection with the Southern California Meat Cutters Unions and Food Employers Pension Trust Fund shall apply to all persons affected by this resolution.